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Supreme Court, U.S.
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No. 94-1924

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN E. HAYES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's Sixth Amendment right to a speedy trial was violated by the sealing of the indictment against him in order to facilitate the apprehension of his overseas co-defendant.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 40 F.3d 362.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1994. A petition for rehearing was denied on March 2, 1995. Pet. App. 12-13. The petition for a writ of certiorari was filed on May 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, peti-

tioner was convicted of conspiracy to commit wire fraud and interstate transportation of money taken by fraud, in violation of 18 U.S.C. 371; two substantive wire fraud counts, in violation of 18 U.S.C. 1343; and interstate transportation of money taken by fraud, in violation of 18 U.S.C. 2314. He was sentenced to a total of 83 months' confinement and a fine. The court of appeals affirmed. Pet. App. 1-11, 16-17.

1. Between 1977 and 1981, petitioner, Frederick Thom, and others executed a fraudulent tax-shelter scheme that deprived investors of nearly $14 million. Petitioner falsely told investors that he had established a grantor trust to trade in gold bullion and foreign currency on margin in foreign markets, and that the trades would yield profits and tax benefits for the investors. Petitioner also falsely represented that the trades would be handled by reputable financial institutions in Switzerland. In fact, petitioner diverted the investors' money into organizations that either he or Thom controlled, and carried out a series of sham transactions to deceive investors that their money was being traded as advertised. In addition, petitioner sent false trading documents to investors to conceal the fraudulent scheme. Gov't C.A. Br. 5-14.

On March 9, 1987, petitioner and Thom were indicted for their fraudulent scheme. On the government's motion, the district court sealed the indictment to facilitate the arrest of Thom, a foreign national who was then known to be residing in Zimbabwe. The court ordered the government to file a status report at least every 90 days detailing its efforts to arrest and extradite Thom. On February 9, 1988, a superseding indictment was returned against petitioner, Thom, and others. That indictment was

also sealed, subject to the same reporting obligation. Pet. App. 2-3.

Between 1987 and November 29, 1991, the government filed 17 status reports with the district court. Those reports described the government's lengthy and complex diplomatic efforts to obtain Thom's arrest, and noted that securing Thom's arrest had been greatly complicated by the fact that the United States and Zimbabwe had no extradition treaty. Specifically, the government asked Zimbabwe several times to arrest and deport Thom. Those efforts were unsuccessful. The government next asked the United Kingdom to intercede on its behalf. Those efforts also failed. In addition, during the period in which the indictment was sealed, Thom was reported to have twice left Zimbabwe temporarily. During those periods, the United States took steps to locate him elsewhere. Those steps included making inquiries to the embassy of Zimbabwe and to Interpol. On January 16, 1992, having exhausted avenues to secure Thom's presence, the government asked that the indictment be unsealed, so that it could proceed to trial against petitioner. Pet. App. 6-7, 21-54.

Petitioner was arraigned on February 5, 1992. On March 10, 1992, petitioner moved that his case be certified as complex under 18 U.S.C. 3161(h)(8)(B)(ii), and waived his rights under the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*, so that he could prepare his defense. The district court granted that motion the following day, and excluded the period between June 1, 1992, and November 2, 1992, the date that trial began, from Speedy Trial Act calculations. In the district court, petitioner did not claim that any of his constitutional rights had been violated by the sealing of the indictment. Pet. App. 3-4.

2. The court of appeals affirmed petitioner's conviction. It rejected petitioner's claim that he was denied due process of law because of pre-indictment delay, as well as his claim that his Sixth Amendment right to a speedy trial had been violated by the delay between indictment and trial. The court reviewed those two claims for plain error, because petitioner had not raised them in the district court. Pet. App. 4-5.

The court rejected petitioner's claim of pre-indictment delay because petitioner had not shown "that the delay was the product of deliberate action by the Government to gain a tactical advantage." Rather, the court noted, the delay resulted from the government's continuing investigation. Pet. App. 3-4.

Evaluating petitioner's speedy trial claim, the court considered the four factors identified in *Barker* v. *Wingo*, 407 U.S. 514 (1972): the length of the delay, the cause of that delay, whether and when the defendant requested a speedy trial, and the prejudice to the defendant. The court concluded that the five-year period between indictment and trial was long enough to warrant examination of the other factors identified in *Barker*. Pet. App. 6. With respect to the cause for the delay, the court concluded that sealing the indictment had been necessary to facilitate the government's legitimate goal of arresting co-defendant Thom, and that "the Government's persistence in trying to locate Thom was not unreasonable." Pet. App. 7. The court noted that the government had been diligent in its efforts to apprehend Thom: It had sought the help of Zimbabwe officials directly, it had enlisted the United Kingdom to intercede on its behalf, and it had attempted to locate Thom when he was believed to have left Zimbabwe

temporarily. *Id.* at 6-7. The court also noted that petitioner had neither requested a speedy trial nor raised a speedy trial claim in the district court. Instead, the court observed, he had effectively delayed trial by successfully moving to have the case declared "complex," thus resulting in the exclusion of time from Speedy Trial Act calculations. *Id.* at 8. Finally, the court held, petitioner's "conclusory" claims of prejudice did not meet his burden to establish actual prejudice. *Ibid.*

ARGUMENT

Petitioner claims (Pet. 10-29) that he was denied his Sixth Amendment right to a speedy trial because of the delay that occurred while the government attempted to secure the arrest of his co-defendant. The court of appeals' application of the four-factor test set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972), to the facts of this case was correct and, as petitioner implicitly concedes, does not conflict with any court of appeals decision. See Pet. 10 (noting novelty of the issue). Review is also unwarranted because the court of appeals correctly applied the plain-error standard of review, see *United States* v. *Olano*, 113 S. Ct. 1770 (1993), and its treatment of the *Barker* factors is therefore inapposite to cases in which speedy trial claims were properly raised in the district court.

In *Barker*, this Court identified four factors to be taken into account in determining whether the Sixth Amendment right to a speedy trial has been violated: the length of the delay, the reason for the delay, whether and when the defendant asserted his right to a speedy trial, and whether the defendant was prejudiced by the delay. *Barker*, 407 U.S. at 530; see also *Doggett* v. *United States*, 112 S. Ct. 2686, 2690

(1992). The Court identified the first factor, length of delay, as "to some extent a triggering mechanism," in that unless there is a period of delay that is presumptively prejudicial, "there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. The five-year period between petitioner's indictment and trial was sufficiently long to warrant consideration of the other *Barker* factors, see *Doggett*, 112 S. Ct. at 2691, but those factors cut against petitioner's claim.

As for the second *Barker* factor, the delay was caused by the government's extensive efforts to arrest and extradite petitioner's co-defendant, Thom. As the court of appeals held, the government reasonably concluded that those efforts could have been compromised had Thom been aware that an indictment was pending against him. See Pet. App. 6.[1] The government's interest in apprehending a co-defendant or securing the presence of an important witness has consistently been recognized as a legitimate basis for pretrial delay. See, *e.g.*, *United States* v. *Walker*, 1 F.3d 423, 427 (6th Cir. 1993) (delay caused by the need to take the deposition of a witness in a foreign country); *United States* v. *Koller*, 956 F.2d 1408, 1413-1415 (7th Cir. 1992) (unavailability of a government witness); *United States* v. *Tranakos*, 911 F.2d 1422, 1428 (10th Cir. 1990) (unavailability of a co-defendant). The lengthy period (more than four years) during

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[1] Apart from its interest in not interfering with Thom's possible arrest and extradition, the government had a separate interest in trying petitioner and Thom together, to save judicial resources and to reduce the possibility of inconsistent verdicts. See *Zafiro* v. *United States*, 113 S. Ct. 933, 937 (1993).

which the indictment was sealed in this case reflected the inherent difficulty of obtaining assistance from a country, Zimbabwe, that did not have an extradition treaty with the United States, and of the other diplomatic measures taken by the government. And as the court of appeals held (Pet. App. 7), the government made "persistent and documented efforts to prosecute Thom." See *Doggett* v. *United States*, 112 S. Ct. at 2691 (deference is due findings below regarding whether government sought to find indicted defendant with diligence).[2]

The third *Barker* factor, assertion of the speedy trial right, also does not support petitioner's claim. Petitioner did not demand a speedy trial in the district court. In fact, far from vigorously pursuing a speedy trial in the district court, see *United States* v. *Koller*, 956 F.2d at 1414, petitioner waived his rights under the Speedy Trial Act by asking that the case be certified as complex under 18 U.S.C. 3161(h)(8)(B)(ii).[3]

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[2] Petitioner notes (Pet. 15-16) that the record is silent as to whether the district court ever required the government to justify (apart from its 17 status reports) the length of the delay caused by the attempts to arrest and extradite Thom. Those status reports, however, supply an ample justification for that delay. To the extent that petitioner argues that a fuller record on that question would have been beneficial, petitioner, by failing to raise any speedy trial claim below, bears responsibility for the lack of additional evidence. Petitioner also argues (Pet. 15) that the court of appeals erred by not independently appraising whether it was in fact realistic to believe that the government would apprehend Thom. But apart from noting that Thom successfully eluded the government, petitioner offers no basis for believing that the government's intention of arresting Thom was unreasonable.

[3] Petitioner appears to argue (Pet. 23-26) that, because the existence of a demand for a speedy trial is but one of the four

Finally, petitioner failed to demonstrate actual prejudice to his defense from the delay. As the court of appeals noted (Pet. App. 8), petitioner's conclusory claims of possible lost evidence and dimmed memories were speculative, and hence insufficient to show prejudice. See, *e.g.*, *United States* v. *Riley*, 991 F.2d 120, 124 (4th Cir.), cert. denied, 114 S. Ct. 392 (1993); *United States* v. *DeClue*, 899 F.2d 1465, 1471 (6th Cir. 1990).[4]

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factors to be considered under *Barker*, the court of appeals misapplied *Barker* when it held that his failure to claim a speedy trial violation in the district court triggered the plain error standard of review and required him to establish prejudice. The issue of whether a defendant has demanded a speedy trial in the district court, however, is separate from the issue of whether the absence of a speedy trial objection in the district court gives rise to plain-error review. *Barker* rejected a proposed rule that a defendant who fails to demand a speedy trial in the district court forfeits his right to do so, holding instead that the presence or absence of such a demand is "is one of the factors to be considered in an inquiry into the deprivation of the right." 407 U.S. at 528. *Barker*, however, did not in any way disturb the familiar rule that a defendant who fails to preserve a claim of a constitutional violation in the district court faces plain error review if he raises such a claim on appeal. *Id.* at 518-519. See *United States* v. *Olano*, 113 S. Ct. at 1776; *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); see also *Peretz* v. *United States*, 501 U.S. 923, 936 (1991) (collecting cases).

[4] Petitioner's claim (Pet. 28) that a government witness suffered a memory lapse on cross-examination does not demonstrate that he was prejudiced by that lapse. See *United States* v. *Tranakos*, 911 F.2d at 1429 (impaired memory of prosecution witness not prejudicial for speedy trial purposes) (collecting cases).

Petitioner's reliance (Pet. 26-29) on *Doggett* to excuse him from demonstrating actual prejudice is misplaced. In *Doggett*, this Court held that the government's extreme negligence in not bringing the defendant to trial for eight and one-half years justified presuming prejudice to the defendant's ability to defend himself —a presumption that the government in *Doggett* was unable to rebut. 112 S. Ct. at 2693-2694 & n.4. In this case, by contrast, the court of appeals did not find negligent conduct by the government, but rather, that the government acted diligently in bringing petitioner to trial. When the government is able to justify its delay, it remains the defendant's burden to establish specific prejudice. See *Doggett*, 112 S. Ct. at 2693 ("Thus, in this case, if the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail. Indeed, that conclusion would generally follow as a matter of course however great the delay, so long as Doggett could not show specific prejudice to his defense."). In any event, in light of the applicability of the plain error standard, petitioner bore the burden to establish actual prejudice, Pet. App. 8; *Olano*, 113 S. Ct. at 1778, and his failure to do so precludes any relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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